

I am going to offer some editorial comments on this ruling. I am not a lawyer, I have no jurisdiction in this matter. I am coming from the perspective of a practicing veterinary dental specialist since 1997 (a practicing veterinarian since 1984). Fraser Hale, DVM, FAVD, DiplAVDC

CITATION: College of Veterinarians v. Johnston, 2017 ONSC 5312

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SUPERIOR COURT OF JUSTICE - ONTARIO

RE: College of Veterinarians of Ontario, Applicant

AND:

Birgit Johnston, personally, and Birgit Johnston, carrying on business as Cutting Edge K9 Oral Hygiene, Respondents

BEFORE: The Honourable Mr. Justice Robert B. Reid

COUNSEL: B. LeBlanc and N. Danson, Counsel, for the Applicant

Respondents self-represented

HEARD: May 15, 2017

ENDORSEMENT

- [1] The applicant, the College of Veterinarians of Ontario (the "College") applies for an order requiring the respondents to cease engaging in the practice of veterinary medicine and cease holding themselves out as doing so.
- [2] More particularly, the College seeks an order as a result of which the respondents will cease engaging in the business of providing anesthetic-free teeth cleaning to dogs.
- [3] The respondent, Birgit Johnston ("Ms. Johnston"), is the owner and operator of the respondent, Cutting Edge K9 Oral Hygiene ("Cutting Edge"). Cutting Edge is a dog teeth cleaning salon located in Johnston's home in Niagara Falls, Ontario.

Background:

- [4] The College sought an interlocutory injunction in this matter. That motion was heard by Justice Faieta of this court on June 7, 2016. His decision, reported at 2016 ONSC 4451 (CanLII) reviewed the factual background of the case in detail at paragraphs 7 - 14. Since those facts apply equally to this application, I am setting them out as follows:

- [7] Cutting Edge's website states:

All Natural Canine teeth cleaning. Anaesthesia free!

Here at Cutting Edge I provide a calm, relaxed environment for your dog to have his/her teeth cleaned based on my extensive training and gentle

Training under what authority and by whom?

handling techniques. This technique is very safe and your pet remains comfortable and alert during the procedure. Your dog simply lays in my lap while I talk, praise and reassure him/her while removing the tarter from his/her teeth. ...

If the dog is not suitable for anesthesia-free cleaning, I will let the owner know and there will be no charge. ...

Special Note: This technique is considered hygienic and not to be confused with a medical procedure. I am not a Veterinarian. I do not practice Veterinary Medicine. I do not diagnose or treat disease. ...

Trained and qualified by whom? There is no legitimate body offering such training and qualification.

A little bit about who I am and what I am about. My name is Birgit Fast Johnston. I am the owner of Cutting Edge and have been professionally trained and qualified in canine oral cleaning. ...

Benefits of Cutting Edge K9 Oral Hygiene Teeth Cleaning:

- No anesthetic or sedation used;
- Helps eliminate bad breath;
- Convenience and flexibility
- Low Cost
- Less stress on your dog As this case will show, this is not a claim that can legitimately be made. This can be a very stressful process.
- No blood work required
- Gentle care for your dog

The teeth cleaning procedure takes approximately 1 to 2 hours and includes

- Removal of plaque and tarter/calculus
- Polishing
- Anti-bacterial gum treatment What is being used here? Is it safe for ingestion, because dogs will swallow it? They will not rinse and spit as you and I might do.
- Home Care Instructions

Special note: This technique is considered hygienic and not to be confused with a medical procedure. I am not a Veterinarian. I do not practice Veterinary Medicine. I do not diagnose or treat disease. ...

And so one might reasonably ask what value is there at all?

Teeth Cleaning.

That has to be a false statement. She cannot be cleaning the below the gum line and I doubt very much she gets between closely spaced incisor and molar teeth.

The first appointment starts with a consultation and visual exam of the mouth. ...

I remove tarter and calculus from all teeth surfaces and then polish to keep teeth smooth and free of ridges.

When you come back for your pet, we will discuss my findings and I will explain a maintenance program to keep your pets mouth healthy between professional cleanings. **If she is not a veterinarian, she should not be making recommendations regarding oral health. She is not qualified.**

This procedure is not suitable for all dogs, eg. If your dog is on immune-suppressing prescription medications (i.e. prednisone), dogs with severe gum disease or very loose molars, or dogs with a history of bite aggression towards people. [Emphasis added.] **This list of exclusions is very incomplete and demonstrates a dangerous lack of knowledge.**

[8] In January 2014 the College learned that Johnston was providing the above services. The College sent a letter dated January 27, 2014 that demanded that the Respondents cease and desist from providing these services. The College sent a further demand letter, dated April 1, 2014, to Johnston.

[9] More than one year later, in October 2015, the College commenced an investigation to determine if Johnston was holding herself out as engaging in the practice of veterinary medicine.

[10] Martin Fischer (“Fischer”) is an Investigation and Inspections Specialist employed by the Applicant. His affidavit describes an undercover investigation that he conducted in relation to the services provided by the Respondent..

14. As part of the investigation, I requested the assistance of the veterinarian Dr. Tammy Hornak of Grand River Veterinary Clinic in Caledonia, Ontario. Dr. Hornak arranged to obtain a dog who could pose as mine for the purposes of having a teeth cleaning performed by Ms. Johnston / K9. Dr. Hornak ultimately obtained a 7 year old King Charles spaniel named Riley for use in the investigation. I came up with the fictitious name “Lucky” for the dog.

15. On or around October 15, 2015, I submitted an email via K9’s website. I used the pseudonym Rhonda Sims and asked about having the teeth cleaned on a 7 year old King Charles spaniel with a heart murmur.

16. On or about October 16, 2015 I called the number advertised on K9’s website and left a voicemail. In my voicemail I identified myself as Mike Fletcher and stated that my wife, Rhonda Sims, had previously sent an email to book a teeth cleaning for our dog. I left my number and requested a call back.

17. On or about October 17, 2015 I received an email response to the email address for Rhonda Sims from Ms. Johnston offering to do the teeth cleaning. Ms. Johnston explained that she had worked on many dogs with heart murmurs and further explained that the “beauty” of anesthesia-free teeth cleaning is that she could work on many dogs that veterinarians cannot. We agreed over email to an appointment for the date of October 26, 2015 at 11:00 a.m. Ms. Johnston explained that the procedure would take between 1 and 2 hours depending on the condition of the dog’s teeth and the dog’s “cooperation”. ...

18. On or about October 26, 2015 at approximately 9:15 a.m. I arrived at Grand River Veterinary Clinic. I met Dr. Hornak who showed me Lucky. Dr. Hornak had performed an examination of Lucky and his teeth, with a report to follow. She also took photographs of Lucky’s teeth.

19. I subsequently took Lucky to K9, which is located at 2758 Portage Road, Niagara Falls, Ontario. I believe this location is also Ms. Johnston’s home address. I arrived at approximately 10:43 a.m.

20. Upon arrival, Ms. Johnston greeted me and examined Lucky’s mouth. She told me that one side of Lucky’s mouth looked better than the other, and posited that Lucky must chew on one side and not the other. She asked about Lucky’s health and I advised that he had cataracts and a heart murmur. Ms. Johnston told me that she would likely be an hour and a half with Lucky and that she would call me when she was done.

21. I left Lucky with Ms. Johnston at approximately 10:48 a.m. after signing a “liability waiver” and leaving my telephone number. ...

22. At approximately 12:09 p.m. I received a call from Ms. Johnston and let it go to voicemail. In the voicemail, Ms. Johnston advised that Lucky was ready to be picked up.

23. At approximately 12:29 p.m. I arrived at K9, where I was greeted by Ms. Johnston and her husband. I did not get the husband’s name. We discussed the procedure Ms. Johnston had performed and she advised that she had removed two of Lucky’s teeth. She told me that the two teeth were “so encased” and were floating in the gums, and that one tooth had no root. She also explained that, with respect to another tooth, there was tartar left in a crack that she could not easily remove. Her husband stated that cleaning Lucky’s teeth was a “two man job”, and Ms. Johnston explained that Lucky had shown a lot of resistance during the cleaning.

24. Ms. Johnston charged me \$160 for the dental cleaning, which I paid her in cash. She told me she did not charge HST. Ms. Johnston’s husband

She extracted (or broke off) two teeth with no pain management. In this case, she clearly caused the animal pain and distress. And despite finding clear evidence of severe disease she still proceeded and made no recommendation to seek appropriate veterinary care. She either did not know or did not care that she was leaving this dog in discomfort and suffering from unassessed and untreated dental disease.

More on the "one tooth had no root" comment. The fact that she showed no awareness of the significance of this observation is further testament to her lack of knowledge of even basic dental concerns. A "missing" root on extraction absolutely calls for detailed examination to determine if the root is retained or if there is a serious disease process that might have destroyed the root.

also gave me several business cards for K9, asking that I distribute them.
...

25. On my way out, Ms. Johnston told me that Lucky's breath was very good and that Lucky would be "much happier". **The implication here is that the procedure had medical benefit**

26. I also took a photograph of the vehicle in the driveway of K9, which had a sign on the door advertising K9. ...

27. I recorded my conversations with Ms. Johnston and her husband from October 26, 2015. ...

28. After I left K9, I returned to Grand River Veterinary Hospital, arriving at approximately 1:40 p.m. I returned the dog to Dr. Hornak, who agreed to perform a further examination on Lucky to determine what had been done to the teeth so that she could provide her report to me.

Bingo. The procedure was worse than useless! It caused the dog pain and suffering and left disease untreated.

29. **Later that day, Dr. Hornak sent me an email and advised me that roots were left behind from the extractions and that Lucky was experiencing pain. She also advised that Lucky required many extractions and that the procedure at K9 with Ms. Johnston would have been "very painful" for Lucky due to the number of mobile teeth he had. ...**

[11] An affidavit by Dr. Tammy Hornak, a veterinarian, states as follows:

2. As part of the investigation, I secured a 7 year old King Charles spaniel named Riley who was being fostered by a local family. I was told that Riley would undergo an anesthesia-free dental cleaning by Ms. Johnston at K9. I agreed to examine Riley before and after the cleaning and to provide the College with a report summarizing my observations.

3. On or about October 26, 2015 I observed Riley's teeth prior to him undergoing the dental procedure by Ms. Johnston / K9. I took several pictures.

Even if we ignore the extractions and the obvious distress suffered by the dog, the procedure failed to clean the teeth adequately. Even if the procedure had no negative impacts, neither did it have any positive impacts.

4. I also observed Riley's teeth on or about October 26, 2015 immediately after the dental procedure and took several more pictures and x-ray images. I noted that two of Riley's teeth were removed. The root tips of one of the removed teeth were visible, and the caudal (or deeper) root tip was also noted on the x-ray image. **As reflected in the pictures, there was tartar on most surfaces, along with pus and trauma.** During gentle probing under sedation, Riley was extremely reactive and exhibited symptoms of pain. I provided Metacam, a pain medication.

5. The foster parent called me that evening and advised that Riley was pawing and rubbing his face on the ground. I therefore applied an Elizabethan collar and dispensed codeine for additional pain control.

[12] Dr. Hornak's report dated October 28, 2015 states:

Riley presented to Grand River Veterinary Hospital for physical and dental evaluation pre and post non-anesthetic dental scaling.

General health report attached.

Pre and Post Canine Dental Chart attached. The pre dental chart was completed the morning prior to the non-anesthetic scaling. Riley was not sedate for the pre evaluation and it was therefore limited. Pre and post photos are provided and they can be distinguished not only by the obvious changes on the teeth but also by the colour of the gloves.

Post procedure

Evaluation performed under propofol sedation. Photos reveal 205 and 206 have been removed. Remaining 206 root tips visible, caudal root tip noted on radiograph. Photos also show the remaining tarter (on most surfaces) pus and trauma. During gentle probing, even under sedation, Riley was extremely reactive/painful. Especially when probing the root tips of 206 and the pockets of 208. Metacam was given for pain.

That evening the Foster Parent called to report that Riley was pawing and rubbing his face on the ground. We applied an E-collar and dispensed codeine for additional pain control.

[13] Johnston states that she did not remove Lucky's teeth. Instead, she states that two teeth were very loose and fell out while she was trying to remove tarter from these teeth. Johnston relies on two photographs that accompany Dr. Hornak's report (see pages 120 and 121 of the Application Record) as showing that these teeth were loose before she saw Lucky.

[14] The Liability Waiver provided by the Respondents and signed by Fischer, posing as "Mike Fletcher", states:

... By signing this agreement, you agree to indemnify and release CUTTING EDGE K9 ORAL HYGIENE...

by her own admission, the procedure would basically be useless.

All instruments are sterilized and all precautions are taken to maintain a hygienic work area. Every effort will be made to clean and remove all the plaque and tartar from your pet's teeth within the scope of practice for a person who is not a licensed veterinarian. It is important to note that your pet will be awake during the procedure, and depending on how much he or she wiggles, it may be impossible to remove all tartar from the teeth.

by her own admission, the procedure may involve pain.

Your dog may be given a non-prescribed, homeopathic remedy to calm him/her for the procedure and/or "Baby Orajel" to sooth sore gums.

And yet she did pull 2 teeth
and she failed to
recommend seeking
veterinary care.

NOTE: **I am not a veterinarian and I am not performing veterinary dentistry. I do not diagnose disease or pull teeth. If your pet is in severe pain, I recommend you take him/her to the vet.** [Emphasis added.]

Legislative Framework:

- [5] The College makes this application on the authority of section 39(1) of the *Veterinarians Act*, R.S.O. 1990, c. V.3 (the “*Act*”). That section provides that:

Where it appears to the College that any person does not comply with any provision of this Act, the regulations or the by-laws, despite the imposition of any penalty in respect of such non-compliance and in addition to any other rights it may have, the College may apply to a judge of the Superior Court of Justice for an order directing the person to comply with the provision, and upon the application the judge may make the order or such other order as the judge thinks fit.

- [6] The applicant submits that Ms. Johnston breached section 11(1) of the *Act*, which provides that “no person shall engage in the practice of veterinary medicine or hold himself, herself or itself out as engaging in the practice of veterinary medicine unless the person is the holder of a licence.”
- [7] As set out in section 1(1) of the *Act*, the practice of veterinary medicine includes the practice of dentistry in relation to an animal other than a human being.
- [8] “Dentistry” is not defined in the *Act*.

The Issues:

- [9] In its essence, this application is for a permanent injunction against Ms. Johnston. The two issues for decision are:
- (a) Does the business of Ms. Johnston constitute the practice of veterinary medicine?
- (b) Is Ms. Johnston holding herself out as a practitioner of veterinary medicine?

Analysis:

- [10] Ms. Johnston’s website makes clear statements that she does not engage in the practice of veterinary medicine. She was consistent in that position throughout her responding affidavit and in her cross-examination on that affidavit. In no part of the investigation performed by Martin Fischer was there a direct indication by Ms. Johnston that she was performing canine dentistry as a veterinarian. No customer could be misled in that regard. **and yet she extracted two teeth**
- [11] As to the service Ms. Johnston provides, the same clarity is lacking. Many of the advantages offered for the “all-natural canine teeth cleaning” are implicitly set out as alternatives to teeth cleaning by a veterinarian; for example: no anesthetic or sedation,

low-cost, less stress on the dog, and the lack of requirement for blood work. The implication is that her services are a reasonable alternative to those provided by a veterinarian. Another reason this procedure is worse than useless as it encourages owners to decline proper veterinary dental care in favour of this useless procedure.

[12] The position of Ms. Johnston is that she provides cosmetic services not dissimilar to the services she provides as a dog groomer. She compares her teeth cleaning service to her practice of grooming dogs where, as she says, she cleans every aspect of the dog including washing weepy eyes; removing hair, wax, fungus or mites from ears; attending to possible skin conditions with medicated shampoos and/or topical over-the-counter sprays; cutting nails; expressing anal glands; and, as required, removing fleas and/or ticks. Owners can choose to use her services for the non-medical benefits that those services provide; for example, whiter teeth and relief from bad breath.

[13] Ms. Johnston did not recommend treatment by a veterinarian when such treatment was obviously required. The root tip of one of the two teeth that had apparently "fallen out" during the teeth cleaning of "Riley" was visible. The subsequent examination by a veterinarian disclosed that seven teeth were mobile and there was evidence of gingivitis and plaque. Ms. Johnston claims that because she does not purport to diagnose disease, she has no responsibility to recommend veterinary treatment. However, the fact that the website contains photos which purport to show canine periodontal disease supports an implication that Ms. Johnston could recognize that disease if found. I find that a customer could reasonably conclude that a dog was not in need of veterinary treatment if none was recommended after the cleaning procedure. The owner would be given a false sense of security as to the state of the dog's oral health. Again, a procedure that is worse than useless

[14] The applicant relies on the opinion of a veterinarian, Dr. Nigel Gumley. He opined that Ms. Johnston engaged in the practice of veterinary medicine in that the services provided by her during the course of the investigation constituted the "practice of [veterinary] dentistry." His report states, under the heading "Summary of Opinion" that:

The provision of teeth cleaning beyond brushing constitutes the practice of veterinary medicine, as outlined in the Veterinarians Act. Only a licensed veterinarian or an appropriately trained veterinary auxiliary under direct supervision of a licensed veterinarian has the training to properly diagnose and treat dental disease in dogs and other animals. Due to the difficulty in obtaining a proper examination and assessment of dental oral health in awake animals, the only accepted technique for proper cleaning must follow a proper oral assessment and treatment under anesthesia. Therefore, the performance of anesthesia-free teeth cleaning not only is a part of the practice of veterinary medicine, it is an unacceptable method.

As advertised on the website for Cutting Edge K9 Oral Health, and from material supplied following an investigation, Birgit Johnston and her company, Cutting Edge K9 Oral Health engaged in dental health cleaning to the level that it met the definition of the practice of veterinary dentistry, and as such, a part of the practice of veterinary medicine.

In providing the dental cleaning without anesthesia, Birgit Johnston and Cutting Edge K9 Oral Health failed to properly inspect and treat the oral pathology present on at least one dog, provided sub-par dental cleaning, mislead [sic] owners of pets as to her capabilities and level of care provided, and took risks in subjecting an elderly patient with potential cardiac disease to the cleaning without anesthesia where adequate veterinary supervision was absent. In general, anesthesia-free dental cleaning cannot adequately assess dental oral health, does not provide management for pain, does not allow for additional and necessary techniques such as radiography, potentially increases stress and risk of injury to both pet and operator, especially where the patient has underlying health conditions.

Does the business of Ms. Johnston constitute the practice of veterinary medicine?

- [15] The court must decide whether the services provided by Ms. Johnston constitute the practice of veterinary dentistry. Regardless of whether Ms. Johnston says she is not providing the services or acting as a veterinarian, it is her actions that must determine the question.
- [16] In the case of *British Columbia Veterinary Medical Association v. MacDonald*, 2004 BCSC 807, the British Columbia Court of Appeal confirmed the motions court decision that cleaning and polishing a dog's teeth using a hand scaling instrument was cosmetic only, in the nature of a grooming service. The service did not provide any health benefit. In that case, the court found that the service did not pose any health risk so as to give rise to any public safety concerns. The service provided by the respondent, as in this case, was canine teeth cleaning without anesthetic and, as in this case, the evidence was that veterinarians only engage in canine teeth cleaning under general anesthetic since the veterinarians' mandate is to deal with canine dental health and not just cosmetic appearance. There, however, the investigation introduced dogs with dental issues to Ms. MacDonald for her comment, but did not have her perform any services.
- [17] Recently, the issue of veterinary dentistry was considered again in British Columbia in the case of *The College of Veterinarians of British Columbia v. Henderson*, 2017 BCSC 917. The facts of that case were similar to those in this case except that the teeth cleaning was provided through the use of an ultrasonic instrument. The evidence was that the instrument was a professional tool, requiring proper use and care which was integral to the animals' health. There was no evidence that the respondent had any training in the use of the instrument and the court found that there was a real health risk to the animals and a concern for public safety, as distinguished from the *MacDonald* decision. Under those circumstances, the court concluded that the respondent was performing veterinary dentistry.
- [18] In his decision on the injunction application in this matter, Justice Faieta considered the principles of statutory interpretation in determining whether the respondent was engaged in the practice of veterinary medicine. In particular, and in the absence of definitions, he

approved of the purposive approach to be applied when interpreting legislation. He noted at paragraphs 28 – 30 that:

[28] In *Wawanesa Mutual Insurance Co. v. Axa Insurance (Canada)*, 2012 ONCA 592, 112 O.R. (3d) 354, at para. 32, the Ontario Court of Appeal stated that a purposive approach is to be applied when interpreting legislation. It stated, at paras. 33-35:

The Supreme Court of Canada has consistently endorsed Elmer Driedger's purposive approach to statutory interpretation... As Driedger explains, at p. 87 of his *Construction of Statutes*, 2d ed., (Toronto: Butterworths, 1983):

[T]he words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.

The purposive approach to statutory interpretation requires the court to take the following three steps: (1) it must examine the words of the provision in their ordinary and grammatical sense; (2) it must consider the entire context that the provision is located within; and (3) it must consider whether the proposed interpretation produces a just and reasonable result.

The factors comprising the "entire context" include the history of the provision at issue, its place in the overall scheme of the Act, the object of the Act itself, and the legislature's intent in enacting the Act as a whole and the particular provision at issue...A just and reasonable result promotes applications of the Act that advance its purpose and avoids applications that are foolish and pointless.

[29] The *Concise Oxford Dictionary*, Twelfth Edition, 2012, Oxford University Press Inc., New York, defines "veterinarian" as a North American term for "veterinarian surgeon." In turn, "veterinarian surgeon" means "a person qualified to treat diseased or injured animals." "Medicine" means "the science or practice of the diagnosis, treatment and prevention of disease (in technical use often taken to exclude surgery.)"

[30] The *Concise Oxford Dictionary*, Twelfth Edition, 2012, Oxford University Press Inc., New York, defines "dentist" as "a person who is qualified to treat the diseases and conditions that affect the teeth and gums." Oxforddictionaries.com defines "dentistry" as the "treatment of diseases and other conditions that affect the teeth and gums, especially the repair and extraction of teeth and the insertion of artificial ones."

[19] At paragraphs 9 and 10 of *MacDonald*, Low J.A. wrote:

[9] There is no definition of “dentistry” in the [Veterinarians Act, R.S.B.C. 1996, c. 476]. The word is not ambiguous by itself or in the statutory context. It should be given its ordinary meaning. The word is defined in the Oxford dictionary as “the profession or practice of a dentist”. “Dentist” is defined as “one whose profession it is to treat diseases of the teeth, extract them, insert artificial ones, etc.; a dental surgeon”. That does not describe the services provided by the respondent. She does not treat diseases of the teeth. It is interesting that the same dictionary defines “dental” as “of or pertaining to the teeth, or to dentistry; of the nature of a tooth” and the Legislature did not choose to include in the definition of “veterinary medicine” dental services or all things dental. Clearly the Legislature intended to restrict this aspect of the prohibition of unlicensed veterinary practice to the scientific treatment of diseases of the teeth in animals and not to include all dental services to animals.

Veterinarians do not provide this service because to do so would be considered below the standard of care (malpractice).

[10] In my opinion, the reasons given by the chambers judge demonstrate a correct application of the modern basic principle of statutory interpretation although he did not specifically refer to that principle. The evidence is that the respondent does not apply dentistry to dogs. The conclusion of the chambers judge is strengthened by the evidence that **the respondent provides a service that is not provided by veterinarians.** It cannot be said that the Legislature intended to prohibit an aspect of the care of dogs’ teeth that is not done by veterinarians and is not treatment of diseases of the teeth.

[20] The College relied on the Ontario Court of Appeal decision in *R. v. Manuel*, (1982) 38 O.R. (2d) 321 at paragraph 17 for the proposition that although words in a statute are normally presumed to be used in their popular sense with no need for expert evidence to explain the meaning of ordinary terms, expert evidence is admissible in certain cases. These cases include where the words "are presumed to be used with the particular meaning with which they are used and understood in the business in question". In that case, the question was the definition of a "public accountant" under the *Public Accountancy Act*, R.S.O. 1970, c. 373. Expert evidence was allowed to describe the functions performed by the different kinds of accountants listed in section 34 of that *Act*, including industrial accountants, cost accountants, or cost consultants.

[21] Dr. Nigel Gumley provided his opinion that the activities of Ms. Johnston constituted veterinary dentistry. In doing so, Dr. Gumley relied on the Professional Practice Standard for Veterinary Dentistry published by the College of Veterinarians of Ontario, dated March 2015. That standard defines veterinary dentistry as involving "every aspect of oral healthcare procedures including but not limited to the cleaning, adjustment, filing, extraction or repair of teeth and treatment of or surgery to related structures." Dr. Gumley's actual opinion, quoted above, was that: "the provision of teeth cleaning *beyond brushing* constitutes the practice of veterinary medicine" [emphasis added]. His opinion and the standard upon which he bases his opinion appeared to be at odds, at least to the extent of whether brushing is permitted given that it is one aspect of oral healthcare which relates to teeth cleaning.

- [22] In this case, the central question is whether Ms. Johnston was engaged in the practice of veterinary medicine by performing dentistry. I do not consider it appropriate to abdicate the determination of that central question to an expert. Second, there is no evidence to suggest that the words "veterinary", "medicine" or "dentistry" within the context of the *Act* have acquired any special meaning or that they have become terms of art. Third, the evidence of Dr. Gumley was itself inconsistent with the professional standard that he purported to adopt. As a result, I find that his opinion and the Professional Standard are of assistance, but not determinative of the issue before the court.
- [23] In my view, pursuant to *Wawanesa*, the court must examine the words of the *Act* in their ordinary and grammatical sense, then consider the entire context within which they are located and finally must consider whether the proposed interpretation produces a just and reasonable result. I also agree with Justice Faieta's review of the applicable dictionary definitions of "veterinarian", "medicine" and "dentistry", including his reference to paragraphs 9 and 10 of the *MacDonald* decision which I have noted above.
- [24] When those dictionary definitions are placed within the context of the *Act*, it makes sense that veterinary dentistry must be understood as pertaining to the treatment of diseases, conditions or injuries to the teeth and gums of animals. This is a common sense interpretation of the language that would come as no surprise to a member of the general public. A service that is said to be cosmetic would be perceived as different from a medical treatment. For example, a groomer might find and recommend treatment for a skin condition in an animal. The groomer's activity, that is, grooming, could not be confused with the services of a veterinarian even if a veterinarian could diagnose and recommend treatment for the same condition. Nor would the groomer's activities be prohibited in favour of a veterinarian. The overall context of the *Act* is that only qualified professionals may provide veterinary services. That context provides assurance to members of the public that individuals to whom they turn for animal health care will be capable of providing that care.
- [25] Animal welfare is another matter. Although the *Act* may serve incidentally to promote or preserve animal welfare, that is not its main function. As Justice Faieta set out in paragraph 34 of his decision on the interim injunction application:

I am not pleased to see the suggestion that animal welfare is only incidental to veterinarians.

The *Act* governs the practice of veterinary medicine in Ontario. **It incidentally serves to promote animal welfare in Ontario.** Animal welfare is more directly addressed by the *Ontario Society for the Prevention of Cruelty to Animals Act*, R.S.O. 1990, c. O.36 ("*OSPCA Act*"). Section 11.1 of the *OSPCA Act* requires persons who own or have custody or control of an animal to comply with standards of care prescribed by regulation. Section 2 of Regulation 60/09 provides for basic standards of care for animals. For instance, it requires that every animal must be provided with the care necessary for its general welfare. However, the *OSPCA Act* provides that this statutory obligation does not apply in respect of an activity carried on in accordance with reasonable and generally accepted practices of agricultural animal care, management or husbandry (s. 11.1(2)), nor does it apply to a veterinarian providing veterinarian care in accordance with standards of

practice established under the *Act* or to a person acting under the supervision or under orders of a veterinarian (s. 11.1(3)).

[26] Ms. Johnston was prosecuted for causing an animal to be in distress under the *OSPCA Act*, based on facts arising out of the same investigation. She was acquitted. The Justice concluded that the Crown had not proved beyond a reasonable doubt that Ms. Johnston's actions contributed to or caused distress for the dog in question. The result of that prosecution does not guide the resolution of this application given that the burden of proof beyond reasonable doubt is not applicable in this case. However, it is an indication of the process that is available if and when there is concern that an individual has failed to provide proper care for an animal.

Acquittal does not equal innocence.

[27] The College makes much of the fact that Ms. Johnston may have caused pain to "Riley", the dog that the investigator brought to Ms. Johnston for treatment. It would be fair to say that the pre-existing periodontal disease and the terrible condition of the dog's teeth were a source of pain long before any procedure used by Ms. Johnston. This was admitted by the examining veterinarian, Dr. Tammy Hornak, whose examination of the dog prior to Ms. Johnston's procedure was limited at least in part because of dental pain. Similarly, Dr. Hornak reported signs of pain in the animal when she conducted a full dental examination following Ms. Johnston's procedure, and subsequent behaviour indicative of pain was reported by the dog's foster family. The extent to which indications of pain observed by Dr. Hornak or the foster family related to the procedure administered by Ms. Johnston as opposed to the dog's pre-existing condition or as a result of the full dental examination is impossible to determine. I do accept that the cleaning procedure administered by Ms. Johnston could not have been pain-free under the circumstances. The issue, however, is not whether Ms. Johnston caused pain to the dog but whether the procedure constituted the practice of veterinary medicine. As I have already outlined, causing distress to animals can be the subject of other proceedings. It appears to me that the purpose of the College in focusing on the infliction of pain has more to do with creating a factual distinction from the *MacDonald* case than to prove Ms. Johnston's breach of section 11(1) of the *Act*. Parenthetically, I note that by using a dog with severe dental health issues as an extreme example to help prove its case, representatives of the College knowingly exposed the animal to pain.

[28] Based on the facts of this case, I conclude that the canine teeth cleaning services provided by Ms. Johnston did not constitute the practice of veterinary dentistry. Veterinarians do not clean a dog's teeth without general anesthesia. To do so would be unacceptable as a part of veterinary medicine. Obviously, that does not prove anything about the practice of Ms. Johnston since she is not a veterinarian. Likewise, the fact that Ms. Johnston did not properly diagnose or treat dental disease in the way a veterinarian would have done is consistent with her nonprofessional status. Since the cleaning and descaling of the dog's teeth was cosmetic only, it cannot be said to have imparted a health benefit that might otherwise be within a veterinarian's purview. The services provided by Ms. Johnston did not fit within any reasonable definition of dentistry or veterinary medicine. She provided a service which is clearly not provided by veterinarians.

Since Ms. Johnston's business does not constitute the practice of veterinary dentistry, it is not technically illegal under the Veterinarians Act. However, what she does would be considered malpractice if done by a veterinarian because it is useless and potentially harmful.

- [29] Put as simply as possible, canine teeth cleaning without anesthesia including polishing and the removal of plaque and tartar above the gum line with the use of hand instruments does not constitute a service provided by veterinarians. As a result, providing those services cannot be the practice of veterinary medicine.

Is Ms. Johnston holding herself out as a practitioner of veterinary medicine?

- [30] As well as prohibiting the unlicensed practice of veterinary medicine, section 11(1) of the *Act* prohibits a person from holding oneself out as engaging in the practice.
- [31] The basic test as articulated, for example, in *College of Opticians of Ontario v. City Optical Inc.*, [2009] O.J. No. 2200 at paragraph 58 is whether a reasonable member of the public would infer from the conduct of the person in question "that she was recognized by law or otherwise" as a veterinarian.
- [32] Although Ms. Johnston relies on the content of her website which indicates specifically that she is not in the practice of veterinary medicine, the test is an objective one and her own intention is irrelevant. Rather, it is the person's whole course of conduct which must be considered.
- [33] Even though I have concluded that the actual teeth cleaning procedure is not the practice of veterinary medicine, Ms. Johnston's website, in several aspects, promotes her services in a way that a reasonable member of the public could consider that a form of veterinary services is being offered.
- [34] Ms. Johnston indicates that she has been professionally trained and qualified in canine oral cleaning. In fact, there is no professional qualification. She completed a 2 1/2 week informal apprenticeship in canine dental cleaning in August 2013 during which time she was instructed by a non-veterinarian. "the blind leading the blind"
- [35] As I have already noted, many of the advantages offered for the teeth cleaning procedure are implicitly set out as alternatives to teeth cleaning by a veterinarian; for example, the lack of anesthetic or sedation, the low-cost, reduced stress on the dog and the lack of requirement for blood work. Those purported advantages are as compared with something, and the something is obviously the services of a veterinarian. As such, a reasonable member of the public could conclude that the services offered have an equivalent benefit to those provided by veterinarians when clearly they do not. To state the obvious, the cosmetic cleaning procedure is of a distinctly different nature from the dentistry performed by a veterinarian. Dentistry performed by a veterinarian includes assessment, diagnosis and treatment of diseases and disorders of the teeth and associated structures, as set out in the professional practice standard of the College. **Ms. Johnston's cosmetic teeth cleaning service is in no way an alternative to proper veterinary dental care.**
- [36] **Ms. Johnston's website promises that she will explain a maintenance program "to keep your pet's mouth healthy between professional cleanings", which implies not only that the procedure is health-related but that she is in a position to advise on matters of a dog's**

denial health. Once again, there is an implication of holding out the provisions of a form of veterinary services.

[37] In addition, a section of the website identifies benefits of healthy oral hygiene in dogs. It states in part that, by way of pain avoidance, "a combination of ongoing home oral care, yearly or bi-yearly visits to an oral hygienist, and veterinary care is very effective in warding off conditions that can cause a dog a great deal of pain." The same section goes into a description of oral problems leading to infected gums and the concerns that would be expressed by a veterinarian who sees that condition. The implication is that Ms. Johnston has either oral hygienist or veterinary qualifications, which she does not. A further statement from the website is that: "A combination of good home and professional care can ward off many serious health problems. For the love of your dog, book your appointment now." Those descriptions and inducements, viewed objectively, give an impression that the cleaning will have direct health benefits to the animal and that Ms. Johnston can deliver those benefits.

[38] Significant space on Ms. Johnston's website is devoted to a description of periodontal disease, including photographs. Since, by her own admission, Ms. Johnston has no training or ability to recognize, diagnose or treat periodontal disease in dogs, I consider those aspects of the website to be misleading. A reasonable person could consider that a form of veterinary services are being provided, even if only by the recognition of periodontal disease and advice as to its treatment. Her advertising on the website implies a greater expertise than she actually possesses, and positions her as capable of providing services and advice that could be understood as being the equivalent to some aspects of a veterinary practice. Compounding the problem of what I consider to be false advertising, Ms. Johnston failed to strongly recommend veterinary treatment for the Cavalier King Charles Spaniel brought to her for teeth cleaning during the College's investigation. This was despite the fact that the cleaning dislodged two of the dog's teeth and that, by all accounts, he had severe oral problems.

[39] As a result of the foregoing conclusions, a declaration will issue that Ms. Johnston has held themselves out as engaging in the practice of veterinary medicine without a licence in violation of section 11(1) of the *Act*.

[40] I am satisfied that there has been a continued breach of the statute by Ms. Johnston and that an order equivalent to injunctive relief should be granted.

[41] Therefore, there will be an order that Birgit Johnston personally, and Birgit Johnston carrying on business as Cutting Edge K9 Oral Hygiene, is prohibited and enjoined from holding out by statement, advertisement, sign, website or any other media directly or implicitly that she is qualified, able or willing to diagnose, prescribe for, prevent or treat any canine oral health disease, condition or injury or to examine or advise as to the physical condition of any dog.

[42] Further, there will be an order that Birgit Johnston personally, and Birgit Johnston carrying on business as Cutting Edge K9 Oral Hygiene, be prohibited from holding out

Paragraphs 41 and 42 are key. They prohibit Ms. Johnson (and by extension, anyone else offering similar service from making any implication that what they do is of any value to the animal.

that she is involved in canine dentistry and that she must forthwith amend her website and any advertising material to delete any reference, either express or implied, to:

- cosmetic cleaning services being an alternative to veterinary oral care for dogs;
- her possession of any professional qualifications as to oral care for dogs;
- her ability to advise on a dog's oral care or oral health;
- a regular program of oral hygiene for dogs administered by her or by an oral hygienist or veterinarian;
- any health care benefits to be derived from cosmetic teeth cleaning; and
- any description or photographs of periodontal disease in dogs.

Costs:

[43] I have encouraged the parties to resolve the issue of costs consensually. In the event that they are not able to do so, I am prepared to receive written submissions according to the following timetable:

- The College is to serve Ms. Johnston with written costs submissions and a bill of costs on or before September 18, 2017.
- Ms. Johnston is to serve the College with written costs submissions and a bill of costs on or before October 2, 2017.
- The College is to serve Ms. Johnston with any responding submissions on or before October 16, 2017.

[44] All submissions are to be filed with the court no later than October 23, 2017. If submissions are not received by that date or any agreed extension, the matter of costs will be deemed settled.

Reid J.

Date: September 6, 2017

Conclusion: For a lay person to clean the crowns of the teeth of a dog without the benefit of chemical restraint is not illegal in Ontario under the Veterinarians Act. On the other hand, it provides no medical benefit to the animal, may cause harm to the animal and may mislead the owner. In other words, there is no benefit, there is risk of harm and so the procedure is worse than useless. Anyone engaging in such a business must not imply that they have any training, knowledge or qualifications and they must not imply or state that there is any medical benefit in what they do. Therefore, one has to wonder why anyone would submit their pet to this procedure.